

*The Changing Art and Architecture of Utility Regulation*  
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**Ethics Architecture: In the Room Where It Happens**

Ethical dilemmas rise up in a variety of circumstances and in many different places. Here, a series of lively and fictional skits will take us into a hearing room at the Nirvana Utilities Commission, the offices of a prestigious law firm, and even a neighborhood coffee shop. Guided by a distinguished ethics expert we will consider and debate the issues depicted in these scenes, i.e., matters of confidentiality, impartiality, civility, truthfulness, and competent use of social media & digital messaging.

**Instruction: Wendy J. Muchman**, Chief of Litigation and Professional Education, Illinois Attorney Registration and Disciplinary Commission of the Supreme Court of Illinois (ARDC).

**Moderator:** Eve Moran, retired ALJ. Skit development and production.

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ABA MODEL RULES

***Client-Lawyer Relationship***

**Rule 1.1 Competence**

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

**Comment on Rule 1.1:**

**Maintaining Competence**

[8] To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.

***Client-Lawyer Relationship***

**Rule 1.6 Confidentiality Of Information**

- (a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).
- (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
- (1) to prevent reasonably certain death or substantial bodily harm;
  - (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;
  - (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;
  - (4) to secure legal advice about the lawyer's compliance with these Rules;
  - (5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;
  - (6) to comply with other law or a court order; or
  - (7) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.
- (c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

***Comment on Rule 1.6:***

**Disclosure Adverse to Client**

[6] Although the public interest is usually best served by a strict rule requiring lawyers to preserve the confidentiality of information relating to the representation of their clients, the confidentiality rule is subject to limited exceptions. Paragraph (b)(1) recognizes the overriding value of life and physical integrity and permits disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm. Such harm is reasonably certain to occur if it will be suffered imminently or if there is a present and substantial threat that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat. Thus, a lawyer who knows that a client has accidentally discharged toxic waste into a town's water supply may reveal this information to the authorities if there is a present and substantial risk that a person who drinks the water will contract a life-threatening or debilitating disease and the lawyer's disclosure is necessary to eliminate the threat or reduce the number of victims.

[7] Paragraph (b)(2) is a limited exception to the rule of confidentiality that permits the lawyer to reveal information to the extent necessary to enable affected persons or appropriate authorities to prevent the client from committing a crime or fraud, as defined in Rule 1.0(d), that is reasonably certain to result in substantial injury to the

financial or property interests of another and in furtherance of which the client has used or is using the lawyer's services. Such a serious abuse of the client-lawyer relationship by the client forfeits the protection of this Rule. The client can, of course, prevent such disclosure by refraining from the wrongful conduct. Although paragraph (b)(2) does not require the lawyer to reveal the client's misconduct, the lawyer may not counsel or assist the client in conduct the lawyer knows is criminal or fraudulent. See Rule 1.2(d). See also Rule 1.16 with respect to the lawyer's obligation or right to withdraw from the representation of the client in such circumstances, and Rule 1.13(c), which permits the lawyer, where the client is an organization, to reveal information relating to the representation in limited circumstances.

***Client-Lawyer Relationship***  
**Rule 1.13 Organization As Client**

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances to the highest authority that can act on behalf of the organization as determined by applicable law.

(c) Except as provided in paragraph (d), if

(1) despite the lawyer's efforts in accordance with paragraph (b) the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action, or a refusal to act, that is clearly a violation of law, and

(2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization,

then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.

(d) Paragraph (c) shall not apply with respect to information relating to a lawyer's representation of an organization to investigate an alleged violation of law, or to defend the organization or an officer, employee or other constituent associated with the organization against a claim arising out of an alleged violation of law.

(e) A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraphs (b) or (c), or who withdraws under circumstances that require or permit the lawyer to take action under either of those paragraphs, shall proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.

(f) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

(g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

### **Comment on Rule 1.3:**

#### **Government Agency**

[9] The duty defined in this Rule applies to governmental organizations. Defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context and is a matter beyond the scope of these Rules. See Scope [18]. Although in some circumstances the client may be a specific agency, it may also be a branch of government, such as the executive branch, or the government as a whole. For example, if the action or failure to act involves the head of a bureau, either the department of which the bureau is a part or the relevant branch of government may be the client for purposes of this Rule. Moreover, *in a matter involving the conduct of government officials, a government lawyer may have authority under applicable law to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. Thus, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful act is prevented or rectified*, for public business is involved. In addition, duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulation. This Rule does not limit that authority. See Scope. (Emphasis added).

#### **Advocate**

#### **Rule 3.3 Candor Toward The Tribunal**

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

### ***Comment on Rule 3.3***

[1] This Rule governs the conduct of a lawyer who is representing a client in the proceedings of a tribunal. See Rule 1.0(m) for the definition of "tribunal." It also applies when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition. Thus, for example, paragraph (a)(3) requires a lawyer to take reasonable remedial measures if the lawyer comes to know that a client who is testifying in a deposition has offered evidence that is false.

[2] This Rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process. A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client, however, is qualified by the advocate's duty of candor to the tribunal. Consequently, although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause, the lawyer must not allow the tribunal to be misled by false statements of law or fact or evidence that the lawyer knows to be false.

### **Representations by a Lawyer**

[3] An advocate is responsible for pleadings and other documents prepared for litigation, but is usually not required to have personal knowledge of matters asserted therein, for litigation documents ordinarily present assertions by the client, or by someone on the client's behalf, and not assertions by the lawyer. Compare Rule 3.1. However, an assertion purporting to be on the lawyer's own knowledge, as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. The obligation prescribed in Rule 1.2(d) not to counsel a client to commit or assist the client in committing a fraud applies in litigation. Regarding compliance with Rule 1.2(d), see the Comment to that Rule. See also the Comment to Rule 8.4(b).

### **Legal Argument**

[4] Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities.

Furthermore, as stated in paragraph (a)(2), an advocate has a duty to disclose directly adverse authority in the controlling jurisdiction that has not been disclosed by the opposing party. The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case.

### **Offering Evidence**

[5] Paragraph (a)(3) requires that the lawyer refuse to offer evidence that the lawyer knows to be false, regardless of the client's wishes. This duty is premised on the lawyer's obligation as an officer of the court to prevent the trier of fact from being misled by false evidence. A lawyer does not violate this Rule if the lawyer offers the evidence for the purpose of establishing its falsity.

[6] If a lawyer knows that the client intends to testify falsely or wants the lawyer to introduce false evidence, the lawyer should seek to persuade the client that the evidence should not be offered. If the persuasion is ineffective and the lawyer continues to represent the client, the lawyer must refuse to offer the false evidence. If only a portion of a witness's testimony will be false, the lawyer may call the witness to testify but may not elicit or otherwise permit the witness to present the testimony that the lawyer knows is false.

[7] The duties stated in paragraphs (a) and (b) apply to all lawyers, including defense counsel in criminal cases. In some jurisdictions, however, courts have required counsel to present the accused as a witness or to give a narrative statement if the accused so desires, even if counsel knows that the testimony or statement will be false. The obligation of the advocate under the Rules of Professional Conduct is subordinate to such requirements. See also Comment [9].

[8] The prohibition against offering false evidence only applies if the lawyer knows that the evidence is false. A lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of fact. A lawyer's knowledge that evidence is false, however, can be inferred from the circumstances. See Rule 1.0(f). Thus, although a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood.

[9] Although paragraph (a)(3) only prohibits a lawyer from offering evidence the lawyer knows to be false, it permits the lawyer to refuse to offer testimony or other proof that the lawyer reasonably believes is false. Offering such proof may reflect adversely on the lawyer's ability to discriminate in the quality of evidence and thus impair the lawyer's effectiveness as an advocate. Because of the special protections historically provided criminal defendants, however, this Rule does not permit a lawyer to refuse to offer the testimony of such a client where the lawyer reasonably believes but does not know that the testimony will be false. Unless the lawyer knows the testimony will be false, the lawyer must honor the client's decision to testify. See also Comment [7].

### **Remedial Measures**

[10] Having offered material evidence in the belief that it was true, a lawyer may subsequently come to know that the evidence is false. Or, a lawyer may be surprised

when the lawyer's client, or another witness called by the lawyer, offers testimony the lawyer knows to be false, either during the lawyer's direct examination or in response to cross-examination by the opposing lawyer. In such situations or if the lawyer knows of the falsity of testimony elicited from the client during a deposition, the lawyer must take reasonable remedial measures. In such situations, the advocate's proper course is to remonstrate with the client confidentially, advise the client of the lawyer's duty of candor to the tribunal and seek the client's cooperation with respect to the withdrawal or correction of the false statements or evidence. If that fails, the advocate must take further remedial action. If withdrawal from the representation is not permitted or will not undo the effect of the false evidence, the advocate must make such disclosure to the tribunal as is reasonably necessary to remedy the situation, even if doing so requires the lawyer to reveal information that otherwise would be protected by Rule 1.6. It is for the tribunal then to determine what should be done — making a statement about the matter to the trier of fact, ordering a mistrial or perhaps nothing.

[11] The disclosure of a client's false testimony can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury. But the alternative is that the lawyer cooperate in deceiving the court, thereby subverting the truth-finding process which the adversary system is designed to implement. See Rule 1.2(d). Furthermore, unless it is clearly understood that the lawyer will act upon the duty to disclose the existence of false evidence, the client can simply reject the lawyer's advice to reveal the false evidence and insist that the lawyer keep silent. Thus the client could in effect coerce the lawyer into being a party to fraud on the court.

### **Preserving Integrity of Adjudicative Process**

[12] Lawyers have a special obligation to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process, such as bribing, intimidating or otherwise unlawfully communicating with a witness, juror, court official or other participant in the proceeding, unlawfully destroying or concealing documents or other evidence or failing to disclose information to the tribunal when required by law to do so. Thus, paragraph (b) requires a lawyer to take reasonable remedial measures, including disclosure if necessary, whenever the lawyer knows that a person, including the lawyer's client, intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding.

### **Duration of Obligation**

[13] A practical time limit on the obligation to rectify false evidence or false statements of law and fact has to be established. The conclusion of the proceeding is a reasonably definite point for the termination of the obligation. A proceeding has concluded within the meaning of this Rule when a final judgment in the proceeding has been affirmed on appeal or the time for review has passed.

### **Ex Parte Proceedings**

[14] Ordinarily, an advocate has the limited responsibility of presenting one side of the matters that a tribunal should consider in reaching a decision; the conflicting position is expected to be presented by the opposing party. However, in any ex parte proceeding, such as an application for a temporary restraining order, there is no

balance of presentation by opposing advocates. The object of an ex parte proceeding is nevertheless to yield a substantially just result. The judge has an affirmative responsibility to accord the absent party just consideration. The lawyer for the represented party has the correlative duty to make disclosures of material facts known to the lawyer and that the lawyer reasonably believes are necessary to an informed decision.

### **Withdrawal**

[15] Normally, a lawyer's compliance with the duty of candor imposed by this Rule does not require that the lawyer withdraw from the representation of a client whose interests will be or have been adversely affected by the lawyer's disclosure. The lawyer may, however, be required by Rule 1.16(a) to seek permission of the tribunal to withdraw if the lawyer's compliance with this Rule's duty of candor results in such an extreme deterioration of the client-lawyer relationship that the lawyer can no longer competently represent the client. Also see Rule 1.16(b) for the circumstances in which a lawyer will be permitted to seek a tribunal's permission to withdraw. In connection with a request for permission to withdraw that is premised on a client's misconduct, a lawyer may reveal information relating to the representation only to the extent reasonably necessary to comply with this Rule or as otherwise permitted by Rule 1.6.

## **Advocate**

### **Rule 3.5 Impartiality And Decorum Of The Tribunal**

A lawyer shall not:

- (a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;
- (b) communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order;
- (c) communicate with a juror or prospective juror after discharge of the jury if:
  - (1) the communication is prohibited by law or court order;
  - (2) the juror has made known to the lawyer a desire not to communicate; or
  - (3) the communication involves misrepresentation, coercion, duress or harassment;
- or
- (d) engage in conduct intended to disrupt a tribunal.

## **Advocate**

### **Rule 3.6 Trial Publicity**

(a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

(b) Notwithstanding paragraph (a), a lawyer may state:

- (1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;



- (2) information contained in a public record;
- (3) that an investigation of a matter is in progress;
- (4) the scheduling or result of any step in litigation;
- (5) a request for assistance in obtaining evidence and information necessary thereto;
- (6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and
- (7) in a criminal case, in addition to subparagraphs (1) through (6):
  - (i) the identity, residence, occupation and family status of the accused;
  - (ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;
  - (iii) the fact, time and place of arrest; and
  - (iv) the identity of investigating and arresting officers or agencies and the length of the investigation.
- (c) Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.
- (d) No lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).

***Comment to Rule 3.6:***

[1] It is difficult to strike a balance between protecting the right to a fair trial and safeguarding the right of free expression. Preserving the right to a fair trial necessarily entails some curtailment of the information that may be disseminated about a party prior to trial, particularly where trial by jury is involved. If there were no such limits, the result would be the practical nullification of the protective effect of the rules of forensic decorum and the exclusionary rules of evidence. On the other hand, there are vital social interests served by the free dissemination of information about events having legal consequences and about legal proceedings themselves. The public has a right to know about threats to its safety and measures aimed at assuring its security. It also has a legitimate interest in the conduct of judicial proceedings, particularly in matters of general public concern. Furthermore, the subject matter of legal proceedings is often of direct significance in debate and deliberation over questions of public policy.

[2] Special rules of confidentiality may validly govern proceedings in juvenile, domestic relations and mental disability proceedings, and perhaps other types of litigation. Rule 3.4(c) requires compliance with such rules.

[3] The Rule sets forth a basic general prohibition against a lawyer's making statements that the lawyer knows or should know will have a substantial likelihood of materially prejudicing an adjudicative proceeding. Recognizing that the public value of informed commentary is great and the likelihood of prejudice to a proceeding by the commentary of a lawyer who is not involved

in the proceeding is small, the rule applies only to lawyers who are, or who have been involved in the investigation or litigation of a case, and their associates.

[4] Paragraph (b) identifies specific matters about which a lawyer's statements would not ordinarily be considered to present a substantial likelihood of material prejudice, and should not in any event be considered prohibited by the general prohibition of paragraph (a). Paragraph (b) is not intended to be an exhaustive listing of the subjects upon which a lawyer may make a statement, but statements on other matters may be subject to paragraph (a).

[5] There are, on the other hand, certain subjects that are more likely than not to have a material prejudicial effect on a proceeding, particularly when they refer to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration. These subjects relate to:

(1) the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness, or the expected testimony of a party or witness;

(2) in a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by a defendant or suspect or that person's refusal or failure to make a statement;

(3) the performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;

(4) any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration;

(5) information that the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and that would, if disclosed, create a substantial risk of prejudicing an impartial trial; or

(6) the fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.

[6] Another relevant factor in determining prejudice is the nature of the proceeding involved. Criminal jury trials will be most sensitive to extrajudicial speech. Civil trials may be less sensitive. Non-jury hearings and arbitration proceedings may be even less affected. The Rule will still place limitations on prejudicial comments in these cases, but the likelihood of prejudice may be different depending on the type of proceeding.

[7] Finally, extrajudicial statements that might otherwise raise a question under this Rule may be permissible when they are made in response to

statements made publicly by another party, another party's lawyer, or third persons, where a reasonable lawyer would believe a public response is required in order to avoid prejudice to the lawyer's client. When prejudicial statements have been publicly made by others, responsive statements may have the salutary effect of lessening any resulting adverse impact on the adjudicative proceeding. Such responsive statements should be limited to contain only such information as is necessary to mitigate undue prejudice created by the statements made by others.

[8] See Rule 3.8(f) for additional duties of prosecutors in connection with extrajudicial statements about criminal proceedings.

### ***Transactions With Persons Other Than Clients***

#### **Rule 4.1 Truthfulness In Statements To Others**

In the course of representing a client a lawyer shall not knowingly:

- (a) make a false statement of material fact or law to a third person; or
- (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

### ***Transactions With Persons Other Than Clients***

#### **Rule 4.4 Respect For Rights Of Third Persons**

- (a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.
- (b) A lawyer who receives a document or electronically stored information relating to the representation of the lawyer's client and knows or reasonably should know that the document or electronically stored information was inadvertently sent shall promptly notify the sender.

### ***Maintaining The Integrity Of The Profession***

#### **Rule 8.2 Judicial And Legal Officials**

- (a) A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office.
- (b) A lawyer who is a candidate for judicial office shall comply with the applicable provisions of the Code of Judicial Conduct.

### ***Maintaining The Integrity Of The Profession***

#### **Rule 8.4 Misconduct**

It is professional misconduct for a lawyer to:

- (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
- (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
- (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
- (d) engage in conduct that is prejudicial to the administration of justice;
- (e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law;
- (f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law; or
- (g) *engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law.* This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules. (Emphasis added).

### ***[Illinois Rules of Professional Conduct]***

#### **RULE 8.4: MISCONDUCT**

It is professional misconduct for a lawyer to:

- (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another.
- (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects.
- (c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.
- (d) engage in conduct that is prejudicial to the administration of justice.
- (e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law.
- (f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law. Nor shall a lawyer give or lend anything of value to a judge, official, or employee of a tribunal, except those gifts or loans that a judge or a member of the judge's family may receive under Rule 65(C)(4) of the Illinois Code of Judicial Conduct. Permissible campaign contributions to a judge or candidate for judicial office may be made only by check, draft, or other instrument payable to or to the order of an entity that the lawyer reasonably believes to be a political committee supporting such judge or candidate. Provision of volunteer services by a lawyer to a political committee shall not be deemed to violate this paragraph.
- (g) present, participate in presenting, or threaten to present criminal or professional disciplinary charges to obtain an advantage in a civil matter.

(h) enter into an agreement with a client or former client limiting or purporting to limit the right of the client or former client to file or pursue any complaint before the Illinois Attorney Registration and Disciplinary Commission.

(i) avoid in bad faith the repayment of an education loan guaranteed by the Illinois Student Assistance Commission or other governmental entity. The lawful discharge of an education loan in a bankruptcy proceeding shall not constitute bad faith under this paragraph, but the discharge shall not preclude a review of the lawyer's conduct to determine if it constitutes bad faith.

(j) *violate a federal, state or local statute or ordinance that prohibits discrimination based on race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status by conduct that reflects adversely on the lawyer's fitness as a lawyer. Whether a discriminatory act reflects adversely on a lawyer's fitness as a lawyer shall be determined after consideration of all the circumstances, including: the seriousness of the act; whether the lawyer knew that the act was prohibited by statute or ordinance; whether the act was part of a pattern of prohibited conduct; and whether the act was committed in connection with the lawyer's professional activities.* No charge of professional misconduct may be brought pursuant to this paragraph until a court or administrative agency of competent jurisdiction has found that the lawyer has engaged in an unlawful discriminatory act, and the finding of the court or administrative agency has become final and enforceable and any right of judicial review has been exhausted.

(k) if the lawyer holds public office:

(1) use that office to obtain, or attempt to obtain, a special advantage in a legislative matter for a client under circumstances where the lawyer knows or reasonably should know that such action is not in the public interest;

(2) use that office to influence, or attempt to influence, a tribunal to act in favor of a client; or

(3) represent any client, including a municipal corporation or other public body, in the promotion or defeat of legislative or other proposals pending before the public body of which such lawyer is a member or by which such lawyer is employed. (Emphasis added).

## **Related Sources (Aiding Skit Development)**

### **A. Government Attorneys:**

- Harvard Law Review, *Government Counsel and Their Obligations*, Vol. 121;1409-1430.

[https://harvardlawreview.org/wp-content/uploads/pdfs/government\\_counsel.pdf](https://harvardlawreview.org/wp-content/uploads/pdfs/government_counsel.pdf)

- Moliterno, James E. (2005), *The Federal Government Lawyer's Duty to Breach Confidentiality*, College of William & Mary Law School.

<http://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=2040&context=facpubs>

- Sparkes, Phillip M. (2008), “*Not Any Ordinary Agent, Not Any Ordinary Attorney: The Government Lawyer and Confidentiality*”  
[https://chaselaw.nku.edu/documents/lglc/govt\\_lawyer\\_and\\_conf.pdf](https://chaselaw.nku.edu/documents/lglc/govt_lawyer_and_conf.pdf)
- Clark, Kathleen, (2008) Washington University Law Rev., *Government Lawyers and Confidentiality Norms*.
- [https://www.americanbar.org/content/dam/aba/events/professional\\_responsibility/2017/Meetings/Conference/conference\\_materials/session9\\_who\\_is\\_my\\_client/Clark-GovtLs&ConfidNorms-WashULR-2007.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/events/professional_responsibility/2017/Meetings/Conference/conference_materials/session9_who_is_my_client/Clark-GovtLs&ConfidNorms-WashULR-2007.authcheckdam.pdf)
- Clark, Kathleen, *Conflicts, Confidentiality and the Client of the Government Lawyer Part I*  
[https://www.americanbar.org/content/dam/aba/publications/public\\_lawyer/confidentiality\\_PLW13.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/publications/public_lawyer/confidentiality_PLW13.authcheckdam.pdf)
- Ontario government lawyers being terrorized by 'bully' bosses, secret  
...<https://www.thestar.com> › News › Investigations **Feb 21, 2018**

## B. Digital Messaging:

- Think Before You Send (the legal risks in casual e-mail)  
<https://www.forbes.com/sites/ciocentral/2012/06/06/think-before-you-send-the-legal-risks-in-casual-e-mail/#11f8a69c41c3>
- Can Lawyers Tweet About Their Work  
<https://www.law.berkeley.edu/files/Can-Lawyers-Tweet-about-Their-Work.pdf>
- Things Never to Send over Work Email  
<https://www.google.com/amp/s/amp.businessinsider.com/things-never-to-send-over-work-email-2017-4>
- Email slip-up breached confidentiality – Minnesota Lawyer  
<https://minnlawyer.com/2017/08/08/email-slip-up-breached-confidentiality/>
- Laurence Tribe Tweet About Trump Sparks Controversy - Law Blog ...  
<https://blogs.wsj.com/law/2016/.../laurence-tribe-tweet-about-trump-sparks-controvers...> Aug 17, 2016
- A World of Twitter Pain for Trump Lawyer John Dowd | The American ...  
<https://www.law.com/americanlawyer/.../americanlawyer/.../a-world-of-twitter-pain-fo...> Dec 4, 2017

- Trial Lawyers Tackle Twitter

[https://www.americanbar.org/publications/law\\_practice\\_magazine/2013/march-april/trial-lawyers-tackle-twitter.html](https://www.americanbar.org/publications/law_practice_magazine/2013/march-april/trial-lawyers-tackle-twitter.html)

<http://www.businessinsider.com/trump-lawyer-michael-cohen-defends-posting-photo-daughter-lingerie-2017-5>

- Ethics opinion counsels attorneys not to BCC clients on emails with opposing counsel. *Ethics Opinion 1076*, N.Y. State Bar Ass'n (Dec. 8, 2015).
- Sending an attachment to the wrong recipient can have dire consequences. 9 *"Reply All" Email Disasters, Week (Nov. 13, 2009)*.
- Margaret Hartmann, *O'Reilly's Team Accidentally Forwarded Strategy Emails to Reporter*, N.Y. Mag. (Apr. 21, 2017).
- Lackey, Michael E. Jr. and Minta, Joseph P. (2012) ["Lawyers and Social Media: The Legal Ethics of Tweeting, Facebooking and Blogging,"](#) Touro Law Review: Vol. 28: No. 1, Article 7.
- *The Florida Bar v. Norkin*, 183 So. 3d 1018 (Fla. 2015) (lawyer disciplined, in part, for sending offensive and threatening emails).
- *The Florida Bar v. Conway*, 996 So.2d 213 (Fla. 2013). A lawyer received a public reprimand after disparaging a judge in a public post online).

### C. Sexual Harassment/Discrimination Matters:

- ABA Resolution 302 as amended (introduced by the Commission on Women in the Profession)  
[http://www.abajournal.com/news/article/aba\\_takes\\_timely\\_stand\\_on\\_sex\\_harassment/](http://www.abajournal.com/news/article/aba_takes_timely_stand_on_sex_harassment/)
- Signs of Sexual Harassment in the Workplace  
<https://www.google.com/amp/s/amp.businessinsider.com/signs-of-sexual-harassment-in-the-workplace-2017-11>
- Women Are Reaching a Critical Mass of Influence at Work | Time  
<http://time.com/5016735/when-women-reach-a-critical-mass-of-influence/>
- How Gretchen Carlson Is Fighting Sexual Harassment | Time.com  
[time.com/4540095/gretchen-carlsons-next-fight/](http://time.com/4540095/gretchen-carlsons-next-fight/)

- Implicit Bias in Legal Arguments - The Optics Always Matter  
<https://abovethelaw.com/2018/03/implicit-bias-in-legal-arguments-the-optics-always-matter/>
- Sexual Harassment 101: what everyone needs to know - world news  
<https://www.theguardian.com/world/2017/oct/16/facts-sexual-harassment-workplace-harvey-weinstein>
- *Three Tips for Addressing Harassment and Discrimination in Law Firms*  
<https://www.law.com/.../three-tips-for-addressing-harassment-and-discrimination-in-la...>
- *Harassed lawyers tell blog about 'touchy feely' partners and 'massively inappropriate' comments*  
[http://www.abajournal.com/news/article/harassed\\_lawyers\\_tell\\_blog\\_about\\_touchy\\_feely\\_partners\\_and\\_massively\\_inappr/](http://www.abajournal.com/news/article/harassed_lawyers_tell_blog_about_touchy_feely_partners_and_massively_inappr/)
- Pratt, Carla D., 2012 MICH. ST. L. REV. 1777, *Sisters in Law: Black Women Lawyers Struggle for Advancement*  
<https://digitalcommons.law.msu.edu/cgi/viewcontent.cgi?article=1072&context=lr>
- Hidden Harassment  
[http://www.abajournal.com/magazine/article/hidden\\_harassment](http://www.abajournal.com/magazine/article/hidden_harassment)

#### **D. Confidentiality:**

- Hirschbiel, Helen, *Top 10 Myths: The Duty of Confidentiality*  
<https://www.osbar.org/publications/bulletin/09jun/barcounsel.html>
- Greenwald, David M. & Slachetca, Michele L. (2015) *Protecting Confidential Legal Information* (Handbook; Jenner & Block Practice Series).  
[https://jenner.com/system/assets/assets/8948/original/2015Jenner\\_26BlockAttorney-ClientPrivilegeHandbook.pdf](https://jenner.com/system/assets/assets/8948/original/2015Jenner_26BlockAttorney-ClientPrivilegeHandbook.pdf)
- *'Isn't That the Trump Lawyer?': A Reporter's Accidental Scoop - The ...*  
<https://www.nytimes.com/.../isnt-that-the-trump-lawyer-a-reporters-accidental-scoop.htm...>  
Sep 19, 2017
- *Trump lawyers spill beans, thanks to terrible choice of restaurant ...*  
<https://www.washingtonpost.com/.../trump-lawyers-spill-beans-after-terrible-restaurant-c...>  
Sep 18, 2017



- <https://presnellonprivileges.com/2017/07/13/meeting-client-in-restaurant-be-wary-of-privilege-waiver/>  
(discussing *MacFarlane v. Fivespice, LLC*, 2017 WL 1758052 (D. Ore. May 4, 2017)).
- J.K. Rowling lawyer fined over Robert Galbraith leak  
<http://www.bbc.com/news/entertainment-arts-25575269>
- *Laurence Tribe Tweet About Trump Sparks Controversy - Law Blog ...*  
<https://blogs.wsj.com/law/2016/.../laurence-tribe-tweet-about-trump-sparks-controversy...> Aug 17, 2016

#### E. Other:

Asking for Trouble: When Lawyers Lie to Judges - Stroock & Stroock ...  
<https://www.stroock.com/siteFiles/Pub784.pdf>

Ninth Circuit Judges To Lawyer: Lying In Court Is Wrong, M'Kay ...  
<https://abovethelaw.com/.../ninth-circuit-judges-to-lawyer-lying-in-court-is-wrong-mk..>

Accusations against judges: Balancing lawyer ethics and the First ...  
<https://www.isba.org/ibj/2017/05/lawpulse/accusationsagainstjudgesbalancingla>

Ethics: Lying to a court comes with a price tag – Minnesota Lawyer  
<https://minnlawyer.com> › Expert Testimony

Lawyer bullies: What to do about it - American Bar Association  
<https://www.americanbar.org/publications/youraba/.../bullying-by-and-of-lawyers.htm...>

I'm a Lawyer, Not a Fighter: Conquering Lawyer Bullies | Litigation ...  
<https://apps.americanbar.org/litigation/litigationnews/.../080816-tips-lawyer-bullies.ht...>  
When zealous advocacy crosses the line - MCLE Self Study  
[https://apps.calbar.ca.gov/mcleselfstudy/mcle\\_home.aspx?testID=109](https://apps.calbar.ca.gov/mcleselfstudy/mcle_home.aspx?testID=109)

Lawyer is suspended for 'intentional bullying tactics' in Facebook ...  
[www.abajournal.com](http://www.abajournal.com) › Daily News

RESPONDING TO APPELLATE LAWYERS WHO CROSS THE LINE  
[www.law.stetson.edu/.../media/responding-to-appellate-lawyers-who-cross-the-line.pd...](http://www.law.stetson.edu/.../media/responding-to-appellate-lawyers-who-cross-the-line.pd...)

